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In the Supreme Court of the United States

OCTOBER TERM, 1941

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a Co-partnership Composed of L. N. Sewell and ——— Sewell, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP and VASSIE JAMES HILL ET AL.,

Petitioners,

VERSUS

W. B. SKIRVIN, Individually and as President, O. W. SKIRVIN, Individually and as Vice-president, M. A. LUTY, Individually and as Secretary-Treasurer and ELLSWORTH JORDAN and F. C. WALLOWER, Individually and as Members of the Board of Directors, Respectively, of American Oil and Refining Company, an Oklahoma Corporation, MRS. PEARL R. MESTA, MRS. GEORGE TYSON, Formerly MRS. M. S. Adams, TEXAHOMA REALTY COMPANY, SKIRVIN OPERATING COMPANY, SKIRVIN HOTEL, Incorporated, and BROADWAY DEVELOPMENT COMPANY, Oklahoma Corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

W. H. BROWN,
HARVE L. MELTON,
JAMES E. ANDERSON,
Attorneys for Petitioners.

March, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, B. W. Coyle, and the others above named represent that:

JURISDICTIONAL STATEMENT

This is a minority stockholders' class or derivative suit originally brought in the State District Court of Oklahoma County, State of Oklahoma on April 11, 1938. On May 11, 1938, certain of the defendants in the original suit filed their petition for removal and sufficient bond, to the United States District Court for the Western District of Oklahoma. Transcript of the proceedings in the state court were duly filed in said federal court and the original plantiffs filed their motion to remand to the state court. On October 6, 1939, the federal District Court overruled the motion to remand. Thereafter the plaintiffs filed their Amended and Supplemental Complaint and later their Second Amended and Supplemental Complaint. The defendants all filed their motions to dismiss this complaint. On April 12, 1941, the federal trial court entered its judgment dismissing the complaint.

From this judgment, the plaintiffs below appealed to the United States Circuit Court of Appeals for the Tenth Circuit. On the 8th day of January, 1942, the Circuit Court of Appeals entered its judgment affirming the judgment of the trial court. On the 6th day of February, 1942, your petitioners as appellants below filed their petition for rehearing which was on the 12th day of February, 1942, overruled.

This petition is filed under the provisions of the Judicial Code, Sec. 240 as amended, Sec. 347(a) of Title 28 U. S. C. A., providing for the issuing of writs of certiorari to review judgments of Circuit Courts of Appeal.

STATEMENT OF ISSUES

This is a minority stockholders' class or derivative suit, originally filed in the District Court of Oklahoma County, State of Oklahoma, on the 11th day of April, 1938. It was brought and joined in by several hundred minority stockholders of the American Oil & Refining Company, an Oklahoma corporation whose 20 year charter had expired on February 5, 1936, but whose affairs had never been wound up. The suit was brought in behalf of the named plaintiffs and of all the stockholders who might want to accept the benefits of the action. There being no authority under the Oklahoma statutes to sue a dissolved corporation, the corporation itself was not made a party (Appendix 1). The former officers and directors of the corporation, who are by statute made the trustees of the dissolved corporation, were all made defendants. Joined with these defendants were the majority or controlling stockholders, consisting both of certain individuals and certain other corporations owning corporate stock.

The complaint charges that these majority stockholders and officers and directors, acting in conjunction, were guilty of most flagrant violations of their fiduciary duties (R. 28-29), by which, continuously and systematically, throughout the life of the corporation and until the filing of

the suit, they all enriched themselves at the expense of the corporation by fraudulent diversions and appropriations of the property of the corporation and by secret profits, in immense sums aggregating millions of dollars, although the exact amount cannot be ascertained except by an accounting.

The plaintiffs below prayed that the defendants be required to account for all of these fraudulent enrichments and to make restitution of the same or the value thereof and that the affairs of the dissolved corporation be finally wound up by the court and distribution made of all such sums recovered as well as any other assets that might be found, after the payment of debts, if any.

The complaint also discloses that in May, 1934, the defendants caused to be organized another American Oil and Refining Company under the laws of the State of Nevada (R. 81-91). To avoid confusion due to the identity of names, this latter corporation is referred to in all of the pleadings and in the opinions of the courts as the "Nevada Corporation," and the original corporation as the "Oklahoma Corporation."

It was the plan of the defendants to transfer all of the assets of the Oklahoma Corporation to the Nevada Corporation and for the latter to issue its stock to the stockholders of the Oklahoma Corporation. It is conceded that such transfer would not be legal without the unanimous consent of the stockholders of the Oklahoma Corporation. Approximately 872 stockholders of the Oklahoma Corporation refused to surrender their stock for cancellation and to accept

stock in the Nevada Corporation (R. 87). These stockholders were scattered through some thirty-five states. It is also conceded that there is no statutory authority in Oklahoma for the consolidation of corporations and that the transfer of all of the assets of one corporation to another, formed for that purpose, does not dissolve the former but that it continues to exist as a separate entity until its charter expires.

Notwithstanding the failure of the minority stockholders to consent to the transfer of assets, the officers of the Oklahoma Corporation, although not making any general assignment, did assign the oil and gas producing properties to the Nevada Corporation, and, thereafter, pretending to act as the officers and directors of the Nevada Corporation, continued to operate said properties as the property of the Nevada Corporation (R. 84) and continued their fraudulent practices until all of the assets of material value were dissipated.

As alleged in the complaint, the plaintiff minority stockholders first receiving information to arouse their suspicions of the irregularities of the defendants about January, 1938 (R. 97), began a diligent investigation of the affairs of the company. While thus engaged, the Globe Pipeline Co., a creditor of the Nevada Corporation filed its suit in the United States District Court of the Western District of Oklahoma, being case No. 2050 (frequently referred to in the record by number) against the Nevada Corporation and W. B. Skirvin on March 19, 1938. On the same day, by agreement between the plaintiff, the Nevada

Corporation and W. B. Skirvin, A. C. Fletcher was appointed as receiver of the Nevada Corporation and apparently took possession of such tangibles as remained in the hands of the Nevada Corporation. The trustees of the Oklahoma Corporation were not made parties to said suit and no attempt was made to appoint a receiver for the affairs of the dissolved Oklahoma Corporation.

As already recited this case was filed about three weeks later on April 11, 1938. On April 14, 1938, the state District Court in this case, upon a full hearing, appointed E. F. Lester as receiver for the dissolved Oklahoma Corporation. It is evident from the order making the appointment (R. 15-17) that the court took over and assumed full control of all of the affairs of the dissolved Oklahoma Corporation for the purpose of completely winding up its affairs as prayed for in the complaint, to the complete exclusion of the statutory trustees who were specifically found guilty of neglect of their duties in that respect.

This case retained the status above described until May 11, 1938, when it was removed to the Federal Court.

On April 29, 1938, while the case was still in the state court, these same trustees who had been thus removed, all defendants in this case and all charged with fraud, to which charges they had not answered, and without the knowledge or consent of the state court, filed amendend articles of incorporation with the Secretary of State purporting to revive the corporation and extend its life 20 years (R. 101-103) and put themselves back in control as officers and directors (R. 201). On the same day, the Globe Pipe Line Co., a

creditor of the Nevada Corporation and plaintiff in case No. 2050, wherein A. C. Fletcher had already been appointed receiver for the Nevada Corporation, filed its amended bill in said case No. 2050, asking that the "revived" Oklahoma Corporation be made a party defendant in that case and that a receiver for the "revived" Oklahoma Corporation be appointed (R. 104). This culminated in the appointment of A. C. Fletcher as receiver for the "revived" Oklahoma Corporation.

As already recited, thereafter, on May 11, 1938, one of the defendants in this case filed her petition and bond for removal to the federal court. The plaintiffs in the state court filed their motion to remand. This motion to remand was not overruled until October 5, 1939 (R. 235). Thereupon, these petitioners as plaintiffs in the removed case filed their Amended and Supplemental Complaint and later their Second Amended and Supplemental Complaint (R. 24-113), hereinafter referred to as the "complaint."

The supplemental complaint detailed the attempt of the removed trustees to revive the Oklahoma Corporation without the consent of the state court having charge of its affairs at the time and called attention to the appointment of a receiver in case No. 2050 for the Oklahoma Corporation while the receivership over its affairs still existed in the state court (R. 104) and asserted its invalidity (R. 104). It was also alleged in the supplemental complaint that during the long interval between the filing of the motion to remand and the overruling of this motion, various of the defendants in the state court had intervened in case No. 2050 and were attempting to have adjudicated all matters

between themselves and the Oklahoma Corporation, including the issues in this case (R. 105). These petitioners in their supplemental complaint prayed that the court protect its jurisdiction over the subject matter of this suit and the issues therein by decreeing the invalidity of such removal and by enjoining said defendants from presenting their claims against the Oklahoma Corporation in any other case except this case (R. 112).

All of the defendants below filed their motions to dismiss the complaint.

The trial court below refused to recognize the validity of the appointment of the receiver of the dissolved Oklahoma Corporation by the state court in this case and refused to appoint a successor upon the receiver's death on July 26, 1940 (R. 245).

On April 12, 1941, the trial court entered its judgment dismissing the Second and Supplemental Complaint and for costs against these petitioners. In the opinion of the trial court it was held that the minority stockholders of the Oklahoma Corporation were without authority in the first instance to institute this suit, the sole authority to institute said suit being in the receiver of the Nevada Corporation (Conclusion 4, R. 233).

From this judgment, these petitioners appealed to the United States Circuit Court of Appeals for the Tenth Circuit.

ASSIGNMENTS OF ERROR

On the 8th day of January, 1942, the Circuit Court of Appeals for the Tenth Circuit rendered its opinion and judgment affirming the action of the trial court in dismissing your petitioners' Second Amended and Supplemental Complaint (R. 240-248).

Your petitioners believe and therefore assert that the Circuit Court erred, in its conclusions of law upon which it based its judgment, in the several particulars set out below, and that said errors not only conflict with the decisions of other Circuit Courts of Appeal in the same matter but that said errors constitute a radical departure from the accepted and usual course of proceedings in such matters:

First Assignment of Error

The court erred in sustaining the validity of the attempted revival of the Oklahoma Corporation by the deposed trustees, purporting to act as the former officers and directors of the dissolved corporation, on April 29, 1938 (R. 246), at a time when the state district court had taken over the affairs of said dissolved corporation for the purpose of winding up its affairs, having actually assumed such charge through its receiver.

Second Assignment of Error

The court erred in upholding the validity of the proceedings in federal case No. 2050 for the appointment of another receiver for the Oklahoma Corporation, begun on

April 29, 1938, while the custody of all of its affairs were being administered by the state court through its receiver.

Petitioners say that the conclusions of law set forth in both the first and second assignments of error are contrary to the following decisions of other circuits and contrary to the many cases cited in said opinions:

Louisville Trust Co. v. *Knott,* 130 Fed. 820 (Eighth Circuit).

Chillicothe Furniture Co. v. *Revelle,* 14 Fed. (2d) 501 (Eighth Circuit).

Hartman v. *Masters,* 269 Fed. 483 (Court of Appeals, D. C.).

Adams v. *Mercantile Trust Co.,* 66 Fed. 617 (Fifth Circuit).

The courts of other circuits in these cited cases announce the positive rule that when a suit is filed in a court of competent jurisdiction to wind up the affairs of a dissolved corporation, from the time of service of process, such court assumes complete jurisdiction and control over all of the affairs of such corporation. That the affairs under its control include not only its physical assets but all claims by or against the corporation and all controversies that may arise in the course of liquidation. That this control is in the court rather than in the receiver and is independent of the actual appointment of the receiver or of his physical possession of property. That this control is exclusive and withdraws such matters from the control of every other court of coordinate jurisdiction and is not a mere matter of comity but is jurisdictional. Furthermore, that this

complete control excludes the officers of such corporation and every other person from interfering or intermeddling with such corporate affairs.

Also that these conclusions are a departure from the accepted and usual course of judicial proceedings. *Porter* v. *Sabin,* 149 U. S. 473, 479 (cited in opinion), *In re Associated Oil Co.,* 271 Fed. 788, and other authorities cited in the Brief in Support of this Petition, hereto attached.

Third Assignment of Error

The court erred in its construction of the statute of Oklahoma, relating to the extension of the life of a dissolved corporation by amended articles of incorporation, and in conflict with the decision of the Supreme Court of Oklahoma in the recent case of *Loeffler* v. *Federal Supply Co.,* 187 Okla. 373, 102 Pac. (2d) 862, the only case construing said statute. This case specifically limits the privilege of such revival to cases "where it has at all times operated as a going concern, and no steps toward winding up its affairs have been taken prior to the revival or renewal of its corporate existence" (Syl. 2), whereas the record in this case clearly shows that the Oklahoma Corporation had long been stripped of its working capital and abandoned by the defendants and that definite steps had been taken in the state court, a court of competent jurisdiction, to wind up its affairs prior to the attempted revival or renewal.

Fourth Assignment of Error

The court erred in its conclusion of law, that, although the minority stockholders had a right to begin this suit, the action has since abated in some way.

Petitioners are unable to determine from the language used in the two last paragraphs of the opinion (R. 246-247) whether it was the holding of the court that upon the appointment of a receiver in the case the principal suit automatically abated, making it necessary for the receiver in the case to institute a new action or that it was the holding of the court that upon the appointment of the receiver in the case it was necessary that the receiver be substituted as plaintiff or that permission of the court be secured for the further prosecution of the suit by the minority stockholders and that the failure of the minority stockholders to do one of these things abated the suit.

Either conclusion of law is contrary to the following decisions from other circuits:

Boston Elevated Ry. Co. v. *Paul Boyton Co.*, 211 Fed. 812 (First Circuit).

Missouri, K. & F. Trust Co. v. *German National Bank*, 77 Fed. 117, 122 (Eighth Circuit).

Hartford Accident & Ind. Co. v. *Federal Bond & Mtg. Co.*, 59 Fed. (2d) 950 (Eighth Circuit).

These cases hold that upon the appointment of a receiver for a corporation, a suit for or against the corporation does not abate. In the absence of a statute requiring a substitution, it may continue under the names of the

original parties and a substitution of the receiver for the corporation is not necessary.

It is not clear from the opinion, whether the court meant that the suit abated before or after removal to the federal court, but the Oklahoma rule on this point is the same as the federal rule. *Savoy Oil Co.* v. *Emery,* 137 Okla. 67, 74, 277 Pac. 1029, 1035.

Petitioners claim that it is the usual and accepted course of judicial procedure, and, as far as their examination of authorities has disclosed, the universal practice in minority stockholders' suits for the action to proceed in the name of the original plaintiffs even though a receiver is subsequently appointed in the case, unless the court for some special reason, in its discretion, makes the substitution, but that cases where the courts have exercised such discretion are extremely rare. In addition to the cases above cited, the brief in support of this petition cites other authorities.

SPECIAL PLEA TO THE DISCRETION OF THE COURT

It may be argued that even though the Circuit Court has erred in its conclusions of law, that these petitioners may accept these erroneous conclusions and follow them and still secure relief by making a demand upon A. C. Fletcher receiver of the "revived" Oklahoma Corporation to institute a new suit in behalf of the "revived" corporation for the wrongs complained of, although approximately

four years have elapsed since these petitioners instituted their minority stockholders' suit.

This argument would disregard all of the rights and advantages accruing to these petitioners by the timely institution of this suit, among which are the following:

1. Petitioners began this suit as soon as the frauds were discovered, so that laches could not be charged against them. Such a defense might be set up against a receiver who has been such for almost four years.

2. Petitioners succeeded in having process served on three important nonresident defendants—Ellsworth Jordan, one of the statutory trustees and upon P. R. Mesta and Mrs. George Tyson, two of the majority stockholders. There is no assurance that these nonresident defendants would again be subject to the process of the court in a new action.

3. The most important advantage was the assertion of liens on most valuable property. For instance, in Count 7 of the complaint (R. 61-73) it is charged that $1,190,000 of the funds of the Oklahoma Corporation were secretly and fraudulently diverted to the erection of the Skirvin Tower and that this structure was in fact an annex to and an integral part of the valuable Skirvin Hotel owned by the Texahoma Realty Company, one of the majority stockholders (R. 28). It was prayed that the court in its equitable jurisdiction decree both the Skirvin Tower and the Skirvin Hotel as one property and that an equitable lien or trust be impressed upon this property in favor of petitioners to the extent of this vast investment in this property. This

constituted *lis pendens* notice to all who might subsequently deal with this property. The timely assertion of this interest constituted a valuable priority which would be lost if petitioners are compelled to rely on another suit to be brought in the future.

Another and perhaps the most important reason why petitioners believe that this honorable court should exercise its discretion to review this case is from the standpoint of orderly equitable procedure.

If it becomes the pronounced law in this circuit that after the officers and statutory trustees of an expired corporation have stripped it of its capital and abandoned it (all of which is admitted by defendants' motions) and after the minority stockholders have pursued the only remedy which they had by instituting a suit in a court of competent jurisdiction to compel an accounting by the wrongdoers and to wind up the affairs of the dissolved corporation and have secured the appointment of a receiver to displace the wrongdoers as corporate officers—if after these things have occurred, it is the announced law that these wrongdoers may defeat the jurisdiction of the court and the control of the court over the *res* by the device of reviving the corporation and putting the affairs of the corporation back in themselves as officers and directors without the knowledge or consent of the court—then such a suit by minority stockholders would be futile. All of the advantages of their diligence in asserting their rights would be lost. Such a rule would be a positive deterrent against scattered minority stockholders incurring the expense of such a futile gesture for the redress of the wrongs. This is contrary to

the policy of courts of equity to make remedies for wrongs convenient and at all times available to those who have been wronged and to reward diligence in the assertion of rights.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United State Circuit Court of Appeals for the Tenth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled *B. W. Coyle et al., Appellants,* v. *W. B. Skirvin et al., Appellees,* No. 2342, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code Section 240, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

W. H. BROWN,
HARVE L. MELTON,
JAMES E. ANDERSON,
Counsel.

APPENDIX TO PETITION

I

Provisions of Oklahoma Statutes relative to dissolution of corporation by expiration of its charter and as to the trustees in charge of its affairs after dissolution, generally referred to as "statutory trustees."

Section 9778, Oklahoma Statutes, 1931.

"9778. *Dissolution of Corporations.*

"A corporation is dissolved:

"First. By the expiration of the time limited by its articles of incorporation. * * *"

Section 9788, Oklahoma Statues, 1931.

"9788. *Directors—Trustees on Dissolution—Service of Process.*

"Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and to collect and pay debts and divide among stockholders the property which remains after the payment of debts and necessary expenses; and for such purposes may maintain or defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action whereto any such corporation is a party shall abate by reason of such dissolution. (Balance of section refers to service of process)."

Section 9789, Oklahoma Statutes, 1931.

"9789. *Liability of Trustees.*

"The trustees mentioned in the preceding section are jointly and severally responsible to the creditors,

stockholders and members of the corporation, to the extent of its property in their hands."

II

Provisions of the Statutes of Oklahoma, as quoted in the opinion below:

Section 9790, O. S. 1931 provides:

"A corporation once dissolved can be revived only by the same power by which it could be created."

Section 9714, O. S. 1931, in part provides:

"any corporation chartered under the laws of this state * * * may extend the time of its existence not exceeding twenty years at any one time, by filing 'Amended Articles of Incorporation' under and as provided by Section 1225 of the Revised Laws of 1910 (9732). * * *"

Section 9732, O. S. 1931, in part provides:

"It shall be lawful for any corporation organized under the laws of the State of Oklahoma, * * * to amend its articles of incorporation. * * * In order to amend its articles of incorporation, it shall be necessary for new articles to be filed, signed by all of the directors and officers of the company which shall be entitled 'Amended Articles of Incorporation' which amended articles of incorporation, as to substance, shall fully comply with the provisions of this chapter, and shall contain the amendments desired, set forth clearly and specifically. When said articles are so amended as aforesaid they shall be filed with the Secretary of State * * * and the Secretary of State shall cause an amended charter to issue, signed by the Governor, and attested by the seal of the State, from which date the amendments shall relate back and be considered and be a part of the original articles of incorporation to the same effect as if originally set forth therein. * * *"

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

In order to avoid confusion, the following table of dates is set out:

February 5, 1916. American Oil & Refining Company (Oklahoma Corporation) organized under the laws of Oklahoma for duration of 20 years (R. 25).

May 14, 1934. American Oil & Refining Company (Nevada Corporation) organized at Reno, Nevada (R. 81).

June 19, 1934. Majority stockholders of Oklahoma Corporation authorize transfer of all assets of Oklahoma Corporation to Nevada Corporation (R. 83).

July, 1934. Transfer of part (only) of assets to Nevada Corporation (R. 83).

February 5, 1936. Charter of Oklahoma Corporation expired by limitation of time.

March 19, 1938. Globe Pipe Line Co., a creditor of Nevada Corporation, sued Nevada Corporation, in Case No. 2050, U. S. District Court Court for Western District of Oklahoma. A. C. Fletcher appointed receiver of Nevada Corporation on same date by agreement (R. 223).

April 11, 1938. This suit filed in state District Court, Oklahoma County, Oklahoma.

April 14, 1938. State District Court, upon hearing, appointed E. F. Lester receiver of dissolved Oklahoma Corporation (R. 15).

April 29, 1938. Former officers of dissolved Oklahoma Corporation (all defendants herein) attempted to revive Oklahoma Corporation by filing amended

articles of incorporation extending life for 20 years and making other fundamental changes (R. 102).

April 29, 1938. Plaintiff in case No. 2050, filed amended bill making "revived" Oklahoma Corporation a party to that suit and asking for appointment of a receiver (R. 104).

May 11, 1938. One of the defendants filed bond and petition for removal of this case to U. S. District Court for Western District of Oklahoma.

October 5, 1939. Plaintiffs' motion to remand to state court overruled (R. 235).

The first 8 sections of this brief contain statements of the principles of law applicable to certain features of this case. Section IX is devoted specifically to a discussion of the assignments of error contained in the petition.

I

There is no statutory authority in Oklahoma for the consolidation of two corporations.

Hence the transfer of all of the property of one corporation to a new corporation formed for that purpose does not constitute a consolidation or end the life of the old corporation, but it continues to exist as a separate entity until its charter expires. This is the holding of the court in *Topeka Paper Co.* v. *Oklahoma Publishing Co.*, 7 Okla. 220, 54 Pac. 455.

Therefore, the Oklahoma Corporation continued to exist after the *partial* assignment of its assets to the Nevada

Corporation in June, 1934, until its charter expired on Feb. 5, 1936.

II

The receiver of the Nevada Corporation had no authority to bring suit on behalf of the Oklahoma Corporation or its stockholders.

It is elementary that the receiver of the Nevada Corporation could bring suit only on claims belonging to the Nevada Corporation. But these claims against the officers, directors and majority stockholders were for damages to the Oklahoma Corporation. They all existed before the Nevada Corporation was organized, except as to the claim for the wrongful assignment of property to it. They constituted *assets* of the Oklahoma Corporation that were never assigned to the Nevada Corporation (R. 83-84). The directors of the Oklahoma Corporation could not have assigned these claims (against themselves) to the Nevada Corporation without the assent of the stockholders. This is conceded. They remained the property of the Oklahoma Corporation until its charter expired on February 5, 1936, and then became the property of its stockholders.

Baker v. *Allen*, 292 Mass. 169, 197 N. E. 521.

United Zinc Co. v. *Harwood*, 216 Mass. 474, 103 N. E. 1037.

If the receiver of the Nevada Corporation were permitted to recover on these claims, the recovery would be the property of the Nevada Corporation and subject to its

debts. We submit that the 872 stockholders of the Oklahoma Corporation who never surrendered their stock and are strangers to the Nevada Corporation have a right to have these assets recovered for their benefit, unincumbered by the debts of the Nevada Corporation.

True, these 872 stockholders of the Oklahoma Corporation might waive the illegality of the attempted transfer to the Nevada Corporation, join the Nevada Corporation, and, if anything remains after its debts are paid participate in any distribution that might be made to its stockholders. But this Court has held in *Geddis* v. *Anaconda Copper Co.*, 254 U. S. 590, 65 L. ed. 425, 431, "Minority stockholders may not lawfully be compelled * * * to elect between losing their interest or entering a new company."

III

Minority stockholders of a dissolved corporation may bring a derivative or class suit in behalf of all of the stockholders for an accounting and to wind up the affairs of the dissolved corporation.

Mason v. *Pewabic Mining Co.*, 133 U. S. 50, 33 L. ed. 524.

Gardner v. *Automatic Arms Co.*, 275 Fed. 697.

Stearns Coal Co. v. *Van Winkle*, 221 Fed. 590.

Louisville Trust Co. v. *Knott*, 130 Fed. 820.

At the time this suit was instituted, April 11, 1938, there was no receiver for the Oklahoma Corporation or its affairs. The only persons other than the stockholders who

could have brought the suit were the statutory trustees whose duty it was to protect the interests of the stockholders. But, under the allegations of the complaint, they were the guilty parties and could not be expected to sue themselves. These petitioners as minority stockholders, therefore invoked the only remedy they had when they brought this suit.

It should be kept in mind that this is not a suit to dissolve a corporation. The Oklahoma Corporation was already dissolved by the expiration of its charter under the express provisions of Section 9778 O. S. 1931 (Appendix I). It is a suit to wind up the affairs of a "dissolved" corporation.

IV

Neither the directors nor the majority stockholders of a solvent going corporation can legally transfer all of its property to another corporation without the unanimous consent of all of the stockholders.

People v. *Ballard,* 134 N. Y. 269, 32 N. E. 54.

Parish v. *Cieneguita Copper Min. Co.,* 12 Ariz. 235, 100 Pac. 781.

Moore v. *Los Lugos Mines,* 172 Wash. 570.

Geddes v. *Anaconda Copper Min. Co.,* 254 U. S. 590, 65 L. ed. 425.

Forrester v. *Boston Elec. Co.,* 21 Mont. 544, 55 Pac. 229.

In the last cited case, the court reviews the decisions and states that the rule is universal.

V

Surrender of stock in such an exchange, by a stockholder induced by fraud of majority stockholders or by concealment of facts or by failure to inform minority stockholder of his legal rights, is not a ratification of the illegal act.

This is because of the fiduciary relation. *Garrett* v. *Reid-Cashion Land and Cattle Co.*, 34 Ariz. 245, 270 Pac. 1044. This opinion contains a most exhaustive review of the authorities.

VI

Minority stockholders induced by fraud to surrender their stock, may join those not surrendering, in a common suit, and equity will consider them in their original status in order that they may participate in any recovery.

Backus v. *Findelstein*, 23 Fed. (2d) 531.

Green Inv. Co. v. *Booth*, 62 Fed. (2d) 321.

Wilcox v. *Harrison Sec. Corp.*, 10 Fed. Sup. 532.

Joined in this suit with the plaintiffs who still own their original certificates of stock in the Oklahoma Corporation aggregating 18,530 shares, are owners of 67,847 shares who surrendered their certificates of stock in the Oklahoma Corporation and accepted shares in the Nevada Corporation (R. 33-34). They allege that they were induced to make such surrender through the fraud of the officers of the corporation (R. 84-87). They claim the right to join in this common suit as the *equitable* owners of shares in the Oklahoma Corporation and participate in the recovery (R. 112).

But even if these surrendering stockholders are improperly joined, under Rule 21 of Federal Rules of Civil Procedure, this would not be ground for dismissal and the legal owners would be permitted to pursue their remedy.

VII

Majority stockholders, controlling stockholders or "dominant stockholders" are fiduciaries and are liable to restitution for losses due to fraudulent acts resulting from such control.

The names of the controlling stockholders and the nature and extent of their control are set forth in the complaint (R. 28-29).

Hyams v. *Heckla Min. Co.*, 221 Fed. 529.

Southern Pacific v. *Bogert*, 250 U. S. 483, 63 L. ed. 1009.

Pepper v. *Litton* (1939), 308 U. S. 295, 84 L. ed. 281.

Jones v. *Missouri Elec. Co.*, 144 Fed. 765.

Heim v. *Jobes*, 14 Fed. (2d) 29.

Meeker v. *Winthrope Iron Co.*, 17 Fed. 48.

VIII

Neither the Nevada Corporation nor its receiver is a necessary party to this suit.

In the opinion of the Circuit Court it is recited that the trial court held that the receiver of the Nevada Corporation is a necessary party to this suit. The Circuit Court did not specifically approve this holding.

An examination of these opinions discloses that there is a misconception of the nature of this suit, namely that this is a contest over the possession of property in the hands of the Nevada receiver. There is no such contest. The complaint shows that practically all of the visible assets of both corporations has disappeared. It is true that the receiver of the Nevada Corporation might have found some tangible properties. It is apparent, however, that this small remnant would be inadequate to compensate plaintiffs even for the properties wrongfully taken over by the Nevada Corporation leaving out of consideration other misappropriations. Besides, the creditors might claim that they gave credit to the Nevada Corporation relying on its possession of these tangibles. Plaintiffs sought no contest with these creditors. On the contrary, they specifically elected to hold their fiduciaries liable for the unlawful diversion to the Nevada Corporation (R. 91) along with the other alleged diversions.

In this particular, the case is parallel to the famous and much cited case of *Heath* v. *Erie Ry. Co.*, 11 Fed. Cases 976, Case No. 6306.

There the bill of the minority stockholders showed a multitude of fraudulent transactions, participated in by at least 15 of the 17 directors, by which they profited themselves and by which wrongful diversions were made to one Vanderbilt, The Narragansette Steamship Co. and other named individuals and corporations. The plaintiffs evidently felt that three of the guilty directors, Gould, Fisk and Lane were able to respond in damages. They there-

fore elected not to pursue the property into the hands of the other conspiring individuals and corporations, but sued Gould, Fisk and Lane and attempted to hold these three directors liable for full restitution for all of these wrongful acts.

These three defendants demurred to the bill on the ground of defect of parties, claiming that the other 12 guilty directors and the conspiring individuals and corporations named in the bill were necessary parties. The court held (page 1000) that in breaches of trust of this nature, the plaintiffs could at their election sue any number or all of these joint tort feasors and that the others were not necessary parties.

In the instant case, the Nevada Corporation is a mere joint tort feasor. It took property of the Oklahoma Corporation wrongfully. The guilty knowledge of its officers was its guilty knowledge. Its own stock records would show that approximately 49 per cent of the stockholders of the Oklahoma Corporation did not consent to the transfer. The fact that it had assumed the same name as the Oklahoma Corporation gave it no more immunity than if it had called itself the Narragansette Steamship Co. Plaintiffs are not attempting to take any property in the possession of the receiver of the Nevada Corporation. That corporation has no interest in and is not affected by this suit in behalf of the dissolved Oklahoma Corporation against its fiduciaries for damages done to the Oklahoma Corporation. nor will it be affected by any distribution the court may make of the amount recovered. If it does claim any in-

terest, the receiver of the Nevada Corporation may intervene in this case at any time.

Besides, under the liberal provisions of Rule 21, F. R. C. P. the court of its own motion or upon the motion of any party may make additional parties.

Attention is here called to a statement in the opinion of the Circuit Court to the effect that Lester, the receiver, did not take possession of any assets of the Oklahoma Corporation (R. 243). This was necessarily true, for the receivership in this case was virtually in a state of suspension from the time of the filing of the petition for removal on May 11, 1938, until the federal court overruled the motion to remand on October 5, 1939 (R. 235). After that date, the receiver could act and there was much that the receiver could have done after that date. For instance, in subdivision 4 of Count 5 of the complaint (R. 55-56) it is recited that from 1922 to 1929, $90,000 of corporate funds were invested in lands, oil and gas leases and mineral rights, title being taken in certain of defendant majority stockholders as set forth in "Exhibit I" (R. 162-171). Apparently these properties were still in the possession of these trustees *ex maleficio* under claim of ownership for the corporations had attorned to their ownership and possession by paying rentals to them on at least part of them (R. 55-56). Under the order of appointment it was the duty of the receiver to "ascertain" and collect the assets of the Oklahoma Corporation. It must be kept in mind, however, that the receiver is an arm of and acts under the direction of the court and not of the parties. It is apparent from the

opinion of the trial court that it never recognized the validity of the appointment of Lester as receiver by the state court. Upon his death in July, 1940, it refused to appoint a successor. Petitioners respectfully urge that the trial court was in error in this conclusion and that had he not entertained this erroneous conclusion he would have directed Lester as receiver to investigate these properties mentioned in the complaint not in the possession of the receiver of the Nevada Corporation and report to the court the status of same and make demand that these trustees deliver possession to the receiver.

What disposition, if any, has been made by the defendant in possession of these lands leases and mineral interests purchased with corporate funds? Have any of them produced oil or gas? Have any rentals, bonuses or royalties been collected from them? The court cannot make personal investigations of such matters. They are proper functions of a receiver and were clearly contemplated by the order of the state court appointing him (R. 15-16).

Thus, while the plaintiffs in their complaint elected to hold their fiduciaries liable for the full value of the property illegally taken over by the Nevada Corporation, rather than to pursue the remnant of this property of questionable value possessed by the receiver of the Nevada Corporation, yet it did not forego its claim to other tangibles that might be found that had not been assigned to or taken over by the Nevada Corporation.

IX

Further consideration of assignments of error set forth in the Petition.

1. ***First and second assignments of error.***

These two assignments of error are considered together for they involve the same legal principles.

Petitioners believe that under the principles set forth under previous sections of this brief, these petitioners filed a proper action for the redress of the wrong done to the Oklahoma Corporation, in the state court on April 11, 1938. In fact, that they sought the only remedy available to them under the recognized practice in equity in such matters. It was an action, among other things to wind up the affairs of the dissolved Oklahoma Corporation and the state court had appointed a receiver in order to effect this purpose. It was thus pending in the state court during the entire month of April, 1938, when the defendants sought to interfere by the attempted revival and the attempt to subject it to a receivership in another court of coordinate jurisdiction.

The case cited in the petition, together with others herein cited, demonstrate that the courts always protect the jurisdiction of the court over the prior or dominant case against a court entertaining another case subsequently filed. The means by which this protection is effected varies with the circumstances.

In *Adams* v. *Mercantile Co.*, cited in the petition, a federal court yielded to a prior case in the state court. In

the *Louisville Trust Co.* case, the Circuit Court of Appeals reversed the trial court for its refusal to so yield. In the case of *Porter* v. *Sabin*, this Court upheld the lower court in dismissing a case because of a prior receivership of the corporation in a state court, using the strongest possible language in emphasizing the exclusiveness of the control in the prior case. Only a part of this language is quoted.

> "Page 479. * * * the court assumes the administration of the estate; the possession of the receiver is the possession of the court. * * *
>
> "The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."

In *Harkin* v. *Masters*, the court repudiated acts of the officers during the liquidation, not because they were within themselves illegal, but because such acts interfered with the administration of the court while all of "the affairs" of the corporation were in "*custodia legis.*" Likewise in the *Associated Oil Co.* case, the court refused to give legal effect to the acts of corporate officials during receivership.

In the *Chillicothe Furniture Co.* case, the court enjoined parties from litigating in another court a matter

concerning corporate affairs while such affairs were being wound up. This remedy by injunction has been frequently resorted to to prevent interference in another court. *Berg* v. *Fidelity & Casualty Co.*, 274 Fed. 311.

In this case, at the first opportunity after the motion to remand had been overruled, the petitioners in their supplemental complaint recited the attempted interferences and prayed that the court hold the attempted revival invalid as far as it affected this case. This cannot be taken as a collateral attack on the "revived" corporation. *Jones* v. *Missouri Electric Co.*, 144 Fed. 765, 775. They prayed that the defendants be enjoined from litigating the issues in this case as between themselves and the Oklahoma Corporation in any other case except this case.

In *Atlas Supply Co.* v. *Roberts*, 180 Okla. 100, 68 Pac. (2d) 76, the Supreme Court of Oklahoma upheld the action of the trial court in proceeding to judgment regardless of the action of another court over the same matter in a subsequently filed case, the case of course being an action *in rem*.

In *State* v. *District Judge*, 108 Okla. 132, 235 Pac. 234, the same court protected the court's jurisdiction over the case first filed, concerning a fund on deposit in a bank, by prohibition, and held that the judgment obtained in the meantime in another court, in a case subsequently filed, was void for want of jurisdiction. In that case, the learned Vice Chief Justice made some very pertinent remarks about the "concerted action" between the parties in the second case getting a speedy judgment before the first case

came to issue. The record in this case indicates the same concerted action. On the same date that Case No. 2050 was filed against W. B. Skirvin and the Nevada Corporation, A. C. Fletcher, a representative of the plaintiff, Globe Pipe Line Co. (R. 104) was appointed receiver. On the same day that the defendants attempted to revive the Oklahoma Corporation, April 29, 1938, the Globe Pipe Line Co. filed its amended bill in Case No. 2050, seeking to make the "revived" Oklahoma Corporation a party defendant and to have a receiver appointed for it. This culminated in the appointment of A. C. Fletcher as receiver for the "revived" Oklahoma Corporation. During the long interval between the filing of the motion to remand and its denial on October 6, 1939, during which time these petitioners were helpless to make any move, the defendants in this case intervened in Case No. 2050 in an attempt to get all matters as between themselves and the Oklahoma Corporation adjudicated, without any contest on the part of the receiver (R. 105).

The instant case is stronger than the case last cited. There the party securing the judgment in the second case filed was a stranger to the first case filed. Here the parties attempting to get adjudications in Case No. 2050 of the issues involved herein are all parties to this suit.

In this connection, it should be kept in mind that while Case No. 2050 was filed on March 19, 1938, it was then only a case against the Nevada Corporation and W. B. Skirvin. The Oklahoma Corporation was not made a party to that case or process served on it until April 29, 1938. This date

was subsequent to the filing of this case and subsequent to the appointment of a receiver herein. The affairs of the Oklahoma Corporation were already in *custodia legis* in this case in the state court.

Petitioners are not parties to Case No. 2050. They respectfully urge that they have a right to their day in court on the issues tendered by them in this case long before the Oklahoma Corporation was made a party to Case No. 2050, unaffected by any attempted adjudications since that time in the latter case.

The court below correctly held that when a case is removed from a state court to a federal court, the receiver appointed by the state court before removal becomes the receiver in the federal court without affecting his previous powers (R. 246). In other words the status of the case and the rights of the parties remain the same after removal as before.

It so happens that this case was removed to the same court in which Case No. 2050 was then pending. There was no consolidation. They remained separate cases. The rights of these petitioners; the advantages they obtained by the timely assertion of liens on valuable property and other priorities obtained by their diligence were most certainly not affected by the pendency of another case in the same court to which this case was removed.

2. *Third assignment of error.*

The specific restrictions contained in the opinion in the case of *Loeffler* v. *Federal Supply Co.*, cited in the petition and in the opinion of the court below, raise the strongest possible inference that the Supreme Court of Oklahoma intended to exclude cases of this kind from the operation of the statute permitting the revival of a corporation by an amendment to its articles of incorporation.

The Oklahoma Corporation on the 29th day of April, 1938, was not a going concern, and, without any working capital, could not be made into a going concern. Steps were then being taken in a court of competent jurisdiction to wind up its affairs. To revive it meant to put its management back into the hands of officers against whom charges of the most flagrant nature were pending in the liquidation suit, unanswered.

The Supreme Court of Oklahoma in the case of *Dill* v. *Johnson*, 79 Okla. 149, 179 Pac. 608, went so far as to dissolve a corporation which was a going concern in order to prevent it from going back under the control of majority stockholders who had previously defrauded it. To the same effect is *Miner* v. *Belle Isle Ice Co.*, 73 Mich. 97, 53 N. E. 218. In *Hartman* v. *Masters, supra,* the court refused to reorganize a corporation where the effect would be to put unfaithful majority stockholders back in control.

The invalidity of the revival, claimed under this assignment of error, is of course in addition to that claimed under the first assignment, where your petitioners have

urged that at the time of the attempted revival, the affairs of the dissolved corporation were in *custodia legis* which excluded any interference by its former officers.

Attention is called to another pernicious result of a rule that trustees may revive a dissolved corporation while a court is attempting to wind up its affairs.

In Count 7 of the complaint, your petitioners charge that the defendant trustees and majority stockholders secretly expended $1,190,000. of the funds of the Oklahoma Corporation in the erection of the Skirvin Tower annex, and that such acts were beyond the corporate powers contained in its articles.

The defendant trustees evidently recognized that the erection of the Tower or any other building was not authorized, for the amended articles of April 29, 1938 (R. 202), contain this provision: "and the Amended Articles of Incorporation are made specifically to include the right not only to own real estate but to erect buildings thereon."

This provision could have no value for future acts for the "revived" corporation had no funds with which to erect new buildings. It is patent that the only effect would be under the retroactive force of amendments under Section 9732, O. S. 1931 (Appendix II) which provides: "From which date the amendments shall relate back and be considered and be a part of the original articles of incorporation to the same effect as if originally set forth therein."

All of the persons executing these amended articles were defendants, charged with this specific ultra vires mis-

appropriation. By this retroactive amendment (if effective) they have legalized their previous illegal acts.

Such acts of the defendants and the advantages claimed by them as a result thereof may be summarized as follows:

While the state court was engaged in winding up the affairs of the dissolved Oklahoma Corporation, which they had stripped, abandoned and apparently forgotten until reminded by this suit, they rushed to the office of the Secretary of State with amended articles extending the life of the corporation 20 years, and with other changes.

Now in effect, they claim:

1. That the court no longer had any control over the affairs of the Oklahoma Corporation for they have taken such control away from the court by the amendment and placed it back in their own control as directors of the "revived" corporation.

2. That the court cannot proceed to wind up its affairs for it is no longer a "dissolved" corporation because its life has been extended 20 years.

3. That the court cannot hold them liable for certain ultra vires acts charged against them for they have by their own retroactive fiat legalized the acts.

If, as apparently contended by the defendants, the statutory power to amend is independent of the control of a court of equity attempting to administer the affairs of a corporation, the defendants may at any time in the future, if pressed too hard in the litigation, relieve themselves of

any liability by filing a retroactive amendment to the articles of incorporation authorizing the act complained of—and this without the consent of the court. Petitioners urge that a court of equity cannot be thus thwarted by wrongdoers.

3. ***Fourth assignment of error.***

The conclusions of law contained in the opinion of the Circuit Court to the effect that this stockholders' derivative suit abated, either upon the subsequent appointment of a receiver in the case or by the failure of the receiver to be substituted as plaintiff or by the failure of the plaintiffs to secure formal consent of the court to prosecute the suit in their own names, is not only contrary to the cases cited in the petition, from other circuits but is contrary to all other cases which we have been able to find. Among these are the following:

St. Louis, C. G. & F. S. Ry. Co. v. *Holliday*, 131 Mo. 440, 33 S. W. 49.

Patrick v. *Eels*, 30 Kans. 680, 2 Pac. 116.

McAnarney v. *Lembeck*, 97 N. J. Eq. 361, 127 Atl. 197.

It is true that the uniform rule is that where there is either a disinterested board of directors or disinterested trustees or a receiver for the corporation at the time the stockholders desire to institute the suit, they must first make demand upon such official representative or representatives of the corporation before bringing the suit in

their own names. This is due to the requirement that the stockholders must exhaust every other means of redress before bringing the suit themselves, and not because of their lack of material interest in the subject matter of the suit. In fact, the very foundation of what is known in equity as a "minority stockholders' suit" is that the minority stockholder has such an interest in the redress of wrongs to the corporation that he may institute the suit where the representatives of the company refuse to do so. Our research discloses no case that holds that the subsequent appointment of a receiver in a suit begun by minority stockholders limits the right of these stockholders to continue to prosecute the suit to a final conclusion.

Here, there was no receiver of the Oklahoma Corporation at the time this suit was filed. The statutory trustees could not be expected to sue themselves, hence no demand on them was necessary, under all of the authorities.

In fact, an examination of reported cases discloses that it is the usual and accepted course of judicial proceedings in this class of cases for the minority stockholders' suit to continue in their names to final judgment even though a receiver is appointed in the case. In fact, we believe that it is the universal practice. Among these cases are the following:

Forrester v. *Boston & M. Const. etc.*, 29 Mont. 397, 74 Pac. 1088.

Oklahoma Sheep and Cattle Co. v. *Hastings*, 80 Okla. 109, 194 Pac. 223.

Riverside Refining Co. v. *Lynch*, 114 Okla. 198, 243 Pac. 967.

Bilby v. *Morton*, 119 Okla. 15, 247 Pac. 384.

The fact that courts so universally follow this practice without question is as persuasive as to the correctness of this procedure as are adjudicated cases to that effect.

CONCLUSION

In conclusion, petitioners call attention to the fact that the allegations contained in the complaint, of vast fraud and of the most flagrant violation of their fiduciary duties by the defendants stand confessed as true by their motions to dismiss and that the judgment of the Circuit Court of Appeals is not upon the merits of the case but concerns procedural matters only.

Petitioners submit that under the authorities cited in this brief, the conclusions of law upon which the judgment of the Circuit Court of Appeals is based are not only contrary to the decisions in other circuits but that they constitute a radical departure from the usual and accepted course of judicial proceedings in minority stockholders' suits. That this departure nullifies the beneficial effects of the timely assertion of liens on valuable property and other advantages gained by the diligence of petitioners in the timely filing of this suit and obtaining process on both resident and non-resident defendants, and will in all probability defeat full recovery and satisfaction for the wrongs alleged against the defendants if they are compelled to institute another suit.

Petitioners further submit that if the opinion of the

Circuit Court of Appeals in this case is permitted to stand as the announced law in this circuit that it will operate as a positive deterrent against minority stockholders of a dissolved corporation attempting to assert the only remedy available to them under the accepted equity practice in the redress of wrongs committed against the corporation by those in charge of its affairs, for the reason that they will realize under the rule announced that the wrongdoers, can without the consent of the court remove the control of corporate affairs from the court and its receiver and place it back in themselves as directors, by the simple device of reviving the dissolved corporation. That by this revival, these same wrongdoers can prevent the winding up of the affairs of the corporation although it does not have a single qualification for reinstatement as a going concern. That in this indirect way, the intangible assets of the dissolved corporation may be subjected in another suit to the debts of a foreign corporation that has already illegally appropriated to itself and wasted its tangible assets.

Petitioners do not mean to infer that the honorable members of the court below intended any such consequences as above enumerated, but petitioners do urge that the court erred in the particulars specified and that such harmful consequences are the logical results of such errors. Furthermore, that these results not only work an injustice to these petitioners but, if taken as a precedent, will work like detriment in all future suits of a similar nature, where minority stockholders of a dissolved corporation desire to seek redress for the wrongs against their corporation, by their fiduciaries.

Petitioners, therefore respectfully urge that this is a proper case to call for the exercise of this honorable court's discretion and supervision of these procedural matters, and that the judgment of the Circuit Court of Appeals in this case should be reversed with such directions as to injunctive or other relief as is necessary to protect the court's prior jurisdiction over the subject matter and issues of this suit, and that the defendants in the case below be required to answer on the merits of the case.

Respectfully submitted,

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March, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1050

B. W. COYLE, et al.,
PETITIONERS,

v.

W. B. SKIRVIN, et al.,
RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

FRED P. BRANSON,
Muskogee, Oklahoma,

D. I. JOHNSTON,
Oklahoma City, Oklahoma,

KEATON WELLS & JOHNSTON,
Oklahoma City, Oklahoma,

SHIRK, EARNHEART, GRIGSBY & SHIRK,
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April, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1050

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a co-partnership composed of L. N. SEWELL and ---- ----. SEWELL, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP, and VASSIE JAMES HILL, et al,

PETITIONERS,

v.

W. B. SKIRVIN, Individually and as President; O. W. SKIRVIN, Individually and as Vice-President; M. A. LUTY, Individually and as Secretary-Treasurer, and ELLSWORTH JORDAN and F. C. WALLOWER, Individually and as Members of the Board of Directors, respectively, of American Oil and Refining Company, an Oklahoma Corporation: MRS. PEARL R. MESTA, MRS. GEORGE TYSON, formerly MRS. M. S. ADAMS; TEXHOMA REALTY COMPANY, SKIRVIN OPERATING COMPANY, SKIRVIN HOTEL, Incorporated, and BROADWAY DEVELOPMENT COMPANY, Oklahoma corporations,

RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF FACTS

The statement of facts contained in the opinion of the United States Circuit Court of Appeals for the Tenth Circuit (Transcript pp. 240, et seq.) is accurate and complete. That contained in the statement of issues in the petition (pp. 3, et seq.) is not complete. It is also argumentative and filled with conclusions to which the respondents do not agree. No further statement of facts will be made herein except in connection with the specific points hereinafter briefed.

PROPOSITION OF LAW INVOLVED

The question involved in this case and that decided by the Circuit Court of Appeals for the Tenth Circuit is: Is a corporation, or its receiver or successor trustee as the case may be, a necessary and indispensable party in a derivative action instituted by minority stockholders against directors and majority stockholders allegedly guilty of misfeasance?

This proposition might perhaps be stated: Do the plaintiffs in this action have the right or authority to prosecute and maintain this action after the appointment of a receiver or successor trustee of the corporation, without first obtaining permission of the court having jurisdiction over the corporation and without making such receiver or

successor trustee a party? It might perhaps be stated as an inquiry into whether or not a cause of action was vested in the plaintiffs at the time the respondents' motion to dismiss was filed. There are other corollary questions involved to a lesser degree, but all of them become relatively unimportant after a decision is made on the primary proposition.

REASONS FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI

Respondents submit that the decision of the Circuit Court of Appeals for the Tenth Circuit is consonant with decisions in substantially similar cases rendered by Circuit Courts of Appeals for other circuits. The decision does not involve an important question of local law in conflict with applicable local decisions. There is no particular federal question involved; but if it should be determined that there is involved any question of federal law or practice, the decision is in harmony with decisions of the Supreme Court of the United States.

FALLACY IN PETITIONERS' POSITION

1.

The petitioners have not distinguished between a situation where a receiver is appointed as ancillary to the litigation and one in which the cause of action is vested in the receiver or a successor trustee. For example, in a mortgage foreclosure case, a receiver may be appointed to collect rents, pay taxes and insurance premiums, and to hold the net proceeds for the party eventually entitled thereto. He

is not a necessary or even a proper party to the proceedings. Where a receiver or successor trustee of a corporation has been appointed, and the corporation has or asserts a claim against third parties, the cause of action is vested in the corporation, which acts through its receiver, or is vested in the successor trustee of the corporation. The cause of action must be prosecuted by such receiver or successor trustee, or at least such receiver or successor trustee must be a party to the litigation so that any judgment rendered therein against third parties will bind the corporation or its successor trustee.

In the case at bar, the action was instituted and prosecuted by minority stockholders, although a successor trustee designated as receiver had been appointed for the corporation in a state court, and although at a subsequent date a general equity receiver was appointed for the corporation in federal court. At no stage of the proceedings was any attempt made to join the corporation or any representative thereof as a party.

2.

There are two corporations by the same name, one a Nevada corporation and the other an Oklahoma corporation. A receiver was appointed for the Nevada corporation and at a subsequent date the Oklahoma corporation was made a defendant in that action and the same individual was appointed as a receiver for the Oklahoma corporation. The case at bar is a suit by minority stockholders of the Oklahoma corporation. They insist that the receiver of the

Nevada corporation is not a necessary party and have more or less predicated their argument upon that proposition. We readily agree that the receiver for the Nevada corporation is not a necessary party except insofar as the rights or property of the Nevada corporation may be involved. Respondents insist however, that the same individual as receiver for the Oklahoma corporation is a proper and necessary party in all litigation wherein the rights of the Oklahoma corporation may in any respect be involved.

The error into which petitioners have fallen is in overlooking the fact that the same individual is receiver for both corporations. The petitioners habitually refer to such receiver as "the receiver for the Nevada corporation" when, insofar as this case is concerned, he is the receiver for the Oklahoma corporation. There should have been no confusion on this score because the respondents said in their appellees' brief in the Circuit Court:

> "It is almost impossible to conceive of any practical or effectual termination of this controversy favorable to the plaintiffs without interference with the receiver of the Nevada corporation, in a real and practical sense. It is also rather difficult to conceive of the attempted re-exchange of stock of the Nevada corporation for stock of the Oklahoma corporation without directly affecting distribution of the assets in the hands of the receiver of the Nevada corporation after creditors are paid. Yet, in order that there may be no confusion and so that the propositions involved may be reduced to their essentials, we will, for the purpose of this brief, continue to ignore the Nevada corporation and its receiver, thus disposing of many of the contentions contained in the plaintiffs' brief."

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Many of the propositions of law cited in petitioners' brief (pp. 20, et seq.) are concurred in by respondents. Most of them are identical with the contentions made in the petitioners' brief in the United States Circuit Court of Appeals for the Tenth Circuit. There the respondents likewise stated in their brief that they did not contest such statements of law, because most of them were either self-evident or wholly immaterial.

The opinion of the Circuit Court is not in conflict with such propositions of law, but so that there may be no confusion, the respondents state that they do not contest the correctness of the statements contained in Proposition 1 (p. 20), Proposition 2 (p. 21), Proposition 3 (p. 22), Proposition 4 (p. 23), Proposition 5 (p. 24), Proposition 6 (p. 24), Proposition 7 (p. 25) and Proposition 8 (p. 25) insofar as it concerns the Oklahoma corporation or its property.

The petitioners have failed to meet the argument presented by the respondents in their motion to dismiss petitioners' second amended complaint and supplement thereto. The District Court, as well as the Circuit Court, held in their respective opinions (T. 221 and 240) that where the action was for the benefit of the corporation, the receiver or the successor trustee of such corporation was a necessary party. In petitioners' brief they do not squarely meet this

issue, nor do they distinguish, explain, nor attempt to distinguish or explain the authorities upon which the District and Circuit Courts relied in their respective opinions.

It is conceded here that neither the Oklahoma corporation nor its receiver, nor its successor trustee, was made a party to this action and that the petitioners never even asked the court to make any of them parties. This is the issue upon which the opinion of the Circuit Court turns and the petitioners have not attempted to meet it. The argument of respondents in summary form is as follows:

The American Oil & Refining Company, an Oklahoma corporation, was incorporated on February 5, 1916. The American Oil & Refining Company, a Nevada corporation, was incorporated on May 14, 1934. All of the tangible assets and many of the intangible assets were transferred by the Oklahoma corporation to the Nevada corporation, and a majority of the stockholders of the Oklahoma corporation exchanged their stock for stock in the Nevada corporation. Some of the stockholders did not, and such transfer of such assets is admittedly invalid.

On March 19, 1938, a creditor of the Nevada corporation instituted an action against it in the United States District Court for the Western District of Oklahoma in cause No. 2050, and A. C. Fletcher was appointed as receiver for the Nevada corporation in that proceeding. He duly qualified and took possession of all of the books, records and assets of the Nevada corporation.

On April 11, 1938, some of the petitioners, as minority stockholders of the Oklahoma corporation, instituted an action in the state court against the respondents alleging in substance that some of the defendants, constituting the last board of directors of such corporation, were trustees of the expired Oklahoma corporation; that the respondents were majority stockholders or had profited from the mismanagement of the Oklahoma corporation. As the Circuit Court of Appeals succinctly stated:

> "The action was a stockholders suit, a derivative action. The gravamen of the complaint is injury to the corporation."

On April 14, 1938, the state court appointed E. F. Lester as a receiver to exercise "the power heretofore vested by law in said trustee so that the duty which devolved by law upon them as such, may be fully performed." On the following day, E. F. Lester qualified, but he never took into his possession any assets of the Oklahoma corporation.

On April 29, 1938, the former officers and directors of the Oklahoma corporation filed with the Secretary of State of Oklahoma, amended articles of incorporation extending the life of the corporation for a period of 20 years from February 5, 1936.

On May 11, 1938, the present case was removed to the United States District Court for the Western District of Oklahoma. E. F. Lester obviously continued as receiver for the assets, or as statutory successor to the Oklahoma corporation.

After the Oklahoma corporation had been revived, it was made a party defendant in case No. 2050 and on June 14, 1938, A. C. Fletcher was appointed as receiver for the revived Oklahoma corporation.

If the Oklahoma corporation could not be revived, as petitioners contend, then E. F. Lester as successor trustee continued as the representative of the corporation until his death in 1940. If the Oklahoma corporation was revived, as respondents contend, then beginning on June 14, 1938, A. C. Fletcher was the receiver of the corporation. Whatever the construction placed upon the Oklahoma statutes or upon the language of the order appointing E. F. Lester, and whatever else may be in conflict or dispute, the fact still remains that at no time was the Oklahoma corporation, A. C. Fletcher as receiver of the revived Oklahoma corporation, E. F. Lester as successor trustee of the expired Oklahoma corporation, or E. F. Lester as receiver for the assets of the expired Oklahoma corporation, made a party plaintiff or defendant in this case. One or the other had vested in him the alleged cause of action against the respondents. Emphatically such cause of action was not vested in the petitioners who are minority stockholders, either from and after the time the Oklahoma corporation was revived, or from and after the time that Messrs. Fletcher and Lester qualified pursuant to their respective appointments.

A corporation's causes of action belong to the corporation, not to its stockholders. A corporation is con-

trolled by its Board of Directors, and if the corporation's causes of action are against wrong-doing directors who refuse to sue themselves, minority stockholders may institute an action and if successful the benefits thereof flow to the corporation, not to the stockholders. When a receiver is appointed by a court, the rights of such minority stockholders to enforce the corporation's rights cease. The corporation (or its property, if dissolved) is now represented by and controlled by a disinterested person who has no hesitation in instituting an action against a wrong-doing director. If the minority stockholders disagree with the receiver's decision not to institute an action against directors for alleged wrong-doing, minority stockholders may appeal to the court appointing the receiver, and if they make out a prima facie case, the court may order the receiver to institute such action as may be proper, or may discharge him and appoint another receiver. The petitioners apparently wish to take unto themselves rights and causes of action not belonging to them, and to exercise their judgment or discretion as to the conduct of litigation, instead of permitting the receiver to determine what shall be done.

The authorities that we cite below sustain the two following propositions:

1. The right of minority stockholders to institute and prosecute an action is a derivative right and ceases when a receiver or other unbiased or disinterested person or persons is, or are, placed in charge of the corporation.

2. A receiver of a corporation is the sole person who may prosecute an action for and in behalf of a corporation for which he has been appointed receiver.

A minority stockholder's derivative right to maintain an action is a secondary right predicated upon a primary injury to the corporation and upon there being no unbiased, unprejudiced representative of the corporation to prosecute the action in the name of the corporation for damages for the injury sustained. Here, A. C. Fletcher was appointed as receiver of both the Nevada and Oklahoma corporations, by the United States District Court. E. F. Lester was appointed as a statutory successor to the corporation by the state court. After the case was removed to the federal court no order was made discharging him, although when A. C. Fletcher was appointed as receiver for the Oklahoma corporation, such order probably had the effect of relieving E. F. Lester of any further responsibility. On the appointment of these gentlemen, the minority stockholders' predicate was gone. There were unbiased and unprejudiced individuals who could prosecute for and in behalf of and in the name of the Oklahoma corporation, revived or in the stead of the Oklahoma corporation expired, such causes of action as the Oklahoma corporation might have.

The petitioners have not seen fit to request that this action be prosecuted by such receiver or successor trustee. They did not even request that they be made a party plaintiff or defendant. The present action, if prosecuted to an

ultimate conclusion, would not bind the Oklahoma corporation nor its representatives. If the present action were tried on its merits and the respondents be successful, there would be nothing to prevent the Oklahoma corporation or the receiver appointed therefor, from bringing a similar action at a later date. Respondents' position is supported by the following cases:

Klein v. *Peter*, 284 Fed. 797 (CCA 8);
Klein v. *Peter*, 286 Fed. 362 (CCA 9);
Kelly v. *Dolan*, 218 Fed. 966 (D.C. E.D. Pa);
Long v. *Stites*, 88 Fed. (2d) 554 (CCA 6);
Thompson on Corporations (3rd Ed.) Vol. 6, p. 486;
Porter v. *Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L.ed. 815;
Craig v. *James, et al.*, 75 N.Y.S. 813;
Planten v. *Nassau National Bank*, 160 N.Y.S. 297;
Reagan v. *Midland Packing Co., et al.*, 8 Fed. (2d) 954 (CCA 8);
Wales v. *Jacobs*, 104 Fed. (2d) 264 (CCA 6);
Swope v. *Villard*, 61 Fed. 417 (C.Ct. S.D. N.Y.);
Dold Packing Co. v. *Doerman*, 293 Fed. 315 (CCA 8);
Ames v. *American Tel & Tel. Co.*, 166 Fed. 820 (C.Ct. D. Mass.);
Jacobson v. *General Motors Corp.*, 22 F. Supp. 255 (D.Ct., S.D., N.Y.);
Cunningham v. *Wechselberg, et al.*, 105 Wis. 359, 81 N.W. 414;
McTammany v. *Day, et al.*, 23 Idaho 95, 128 Pac. 563;
Williams v. *Halliard*, 38 N.J. Eq. 375;

Scholl v. *Allen*, 237 Ky. 716, 36 S.W. (2d) 353;

Deering v. *Stites*, 257 Ky. 403, 78 S.W. (2d) 46;

Horning v. *Peters*, 202 Mich. 140, 267 N.W. 874;

Hawes v. *Oakland*, 104 U.S. 450, 26 L.Ed. 827.

COMMENTS UPON AUTHORITIES CITED BY PETITIONERS

In this case, there is involved no question of conflicts of jurisdiction or attempted exercise of jurisdiction by different courts. There was nothing pertaining to such a claimed conflict presented to the Circuit Court of Appeals by either side. The argument or suggestion that the federal court attempted to interfere in any respect with the state court is presented for the first time here. That such is not proper, is too well established to require citation of authorities. The facts show, however, that there could not possibly be any conflict. On April 14, 1938, a successor trustee was appointed in the state court for the assets of the expired Oklahoma corporation. The case was removed from the state court to the federal court on May 11, 1938, and at that time E. F. Lester became an officer of the federal court. From that time forth, the federal court might remove him or not, as it pleased. On June 14, 1938, the federal court appointed A. C. Fletcher as receiver for the Oklahoma corporation revived. At no time were there two courts attempting to exercise jurisdiction over the same res.

Therefore, the cases cited on pages 30, 31 and 32 are not in point.

It is submitted that the case of *Loeffler* v. *Federal Supply Company*, 187 Okla. 373, 102 Pac. (2d) 862 authorizes the revival of the expired Oklahoma corporation. The Circuit Court so construed it (T. 246). Whether or not that case is applicable here tends to determine whether the Oklahoma corporation's cause of action, if any, against the respondents was vested in A. C. Fletcher as receiver or in E. F. Lester as receiver or successor trustee, but since neither of them were parties and since neither of them were even suggested as proper parties, the decision on the applicability of the Loeffler case is more or less pedantic.

Petitioners complain that of the cases cited by the respondents, all of them involve situations where the minority stockholders' suit has been instituted after some court has appointed a receiver for the corporation. They state, without reservation, that where the minority stockholders' suit has been first instituted, the subsequent appointment of a receiver in that suit, or in any other suit, has no effect upon the minority stockholders' suit and that they may prosecute it to judgment. They state that, in their research, they have been unable to find any case sustaining the respondents' position and they cite various state court decisions at pages 38, 39 and 40 asserting that such support their position.

They have completely overlooked the leading case of *Adler* v. *Seaman*, 266 Fed. 828 (CCA 8). We state suf-

ficient of the facts in that case for an understanding of the subsequent quotations from the opinion. Seaman, a preferred stockholder of the Union Railway Company, filed his complaint charging waste and maladministration by the past and present directors of the company. He sought removal of the directors, an accounting and the appointment of a receiver. The following year, Adler, a bondholder under a junior mortgage, filed his bill in equity against the company and asked for the appointment of a receiver. In the Adler suit, a receiver was appointed. The court then consolidated the Seaman and Adler cases and ordered that the Adler suit be treated as an intervention in the Seaman case. In passing upon the propriety of the order of consolidation and the order making one case subservient to the other, the court said:

> "It is thus clear that the receiver in the Adler bill would have been a necessary party to any action such as Seaman brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. *The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule.* The receiver is not a party to that suit. He can become such only by an order of the court *(Wilder* v. *City*, 87 Fed. 843, 31 C.C.A. 249, C.C.A. 5th Circuit); 22 Standard Enc. of Prac. 434; High on Receivers (4th Ed.) sec. 258, although he might be made so by such an order *(National Electric Signaling Co.* v. *Telefunken Wireless Teleg. Co.*, 208 Fed. 679, 698, 125 C.C.A. 647). *No application by the receiver or by any one else to have him made party to the Seaman suit has been ruled upon or even filed in the Adler suit.* * * *

"*Upon qualification, the Adler receiver became a necessary party to the Seaman ligitation, because he succeeded to the rights of the corporation to pursue its officers and directors for maladministration.* Such a suit by the receiver would be in course of collecting the corporation assets, and would be ancillary to the main action. *Pope* v. *Railway Co.*, 173 U.S. 573, 19 Sup. Co. 500, 43 L.Ed. 814; *White* v. *Ewing*, 159 U.S. 36, 15 Sup. Ct. 1018, 40 L.Ed. 67; *Porter* v. *Sabin*, 149 U.S. 473, 13 Sup. Ct. 1008, 37 L.Ed. 815; *In re Tyler*, 149 U.S. 164, 181, 13 Sup. Ct. 785, 37 L.Ed. 689; 34 Cyc. 381. Such character of suit assumes no higher standing because brought by a stockholder and pending at the time the receiver was appointed. No good result, but only confusion, could follow by extension of the receivership to the Seaman suit. * * *

"*To repeat, the proper procedure was, by leave of court, to bring the receiver into the Seaman suit as a party, so that the receiver may prosecute the suit, if deemed advisable by the court, or may, as party defendant, be bound by the adjudication.* While it has been questioned whether a stockholder could prosecute such a suit pending a receivership (*Kelly* v. *Dolan*, 233 Fed. 635, 147 C.C.A. 443), we see no reason why such should not be permitted, if leave be secured from the court appointing the receiver to join him as defendant, and this seems to be the effect of the decision in *Porter* v. *Sabin*, 149 U.S. 473, 13 Sup. Ct. 1008, 37 L.Ed. 815, and to accord with justice (*Marcuse* v. *Gin Co.*, 52 La. Ann. 1383, 1394, 27 South. 846; *Brinckerhoff* v. *Bostwick*, 88 N.Y. 52; Id., 23 Hun. 237; Id. 99 N.Y. 185, 1 N.E. 663)."

CONCLUSION

We therefore submit that there is absent in this case any conflict between the various Circuit Courts of Appeals, any important question of local law necessary to a proper decision in this case which in any way conflicts with ap-

plicable local decisions, and any important question of federal law which should be settled by this Court. As a matter of fact, when one has a complete understanding of the questions involved in this case, it will readily be seen that the opinion of the Circuit Court of Appeals for the Tenth Circuit was in accordance with many other decisions of the Supreme Court of the United States and of the various other Circuit Courts of Appeals. We therefore respectfully suggest that the petition for writ of certiorari be denied.

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April, 1942.

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NO. 1050

In the Supreme Court of the United States

OCTOBER TERM, 1941

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a Copartnership Composed of L. N. Sewell and ——— Sewell, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP and VASSIE JAMES HILL ET AL.,

Petitioners,

VERSUS

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Respondents.

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April, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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Respondents.

REPLY BRIEF OF PETITIONERS

Respondents Adopt Theory of Circuit Court of Appeals and Not That of Trial Court

These petitioners in their original brief called attention to the conflict between the opinion of the trial court and that of the Circuit Court of Appeals.

The former, in sustaining the motions to dismiss the

complaint, did so on the ground that these petitioners as stockholders of the Oklahoma Corporation had no right to institute this suit "since the right, at the time, to insitute said suit was vested solely in the receiver of the court in Case Number 2050" (Receiver of Nevada Corporation) (R. 233).

The Circuit Court, on appeal, did not adopt this theory. On the contrary, it recognized the regularity of these proceedings as originally brought and the regularity of the appointment of E. F. Lester as receiver of the Oklahoma Corporation, but held that this suit has abated since that time in some way.

Due to this confusion, petitioners, in their original brief set forth certain principles of law in propositions I to VIII, inclusive (pp. 20-29), not only sustaining their right to bring this action but showing that they invoked the only remedy available to them to secure redress for the wrongful acts of their fiduciaries.

Respondents, in their answer brief, admit the correctness of these eight propositions of law. They thereby place themselves squarely behind the conclusion of the Circuit Court rather than that of the trial court.

This conclusion of the Circuit Court, thus adopted by the respondents is, that, although this suit was regularly instituted and a receiver regularly appointed, it has since abated by reason of the failure of petitioners to have the receiver, E. F. Lester, substituted as plaintiff or to get formal permission of the court to prosecute the suit in their own names.

Petitioners, on pages 12 and 13 of their petition cite numerous decisions from other circuits and from Oklahoma holding that the appointment of a receiver in a case does not abate the principal suit and that it is not necessary to substitute the receiver as a party plaintiff. On page 38 of their brief, additional cases are cited sustaining this rule. On pages 39 and 40, a large number of additional cases are cited where the question was not raised but indicating that it is the general practice for minority stockholders' suits to continue in the names of the original plaintiffs, after the appointment of a receiver in the case. These petitioners there stated, "in fact, we believe that is the universal practice." If there are any cases to the contrary, undoubtedly respondents would have found them. Evidently they could find none for they do not cite any authorities where the practice is different.

On pages 12 and 13 of their answer brief, they do cite a full page of authorities. Many others could have been added to these, to the same effect. These cited cases recite the well-recognized rule, that, *after a receiver has been appointed,* stockholders may not *begin* a derivative suit without first making a demand upon the receiver to do so.

These cited cases are not in conflict with the cases cited by these petitioners. None of them hold that the subsequent appointment of a receiver abates the principal suit *already pending* or that substitution of the receiver as party plaintiff is necessary. This conclusion of law of the Circuit Court, upon which it based its judgment, is therefore not supported by any authority and, if approved, con-

stitutes a complete reversal of the universal practice in stockholders' suits. Such a reversal should not be made except upon sound fundamental reasons. The only reason advanced by respondents is contained on pages 11 and 12 of their brief, where they say that if the case is prosecuted by the stockholders, a judgment rendered in the case would not be binding on the corporation or its representatives and that another suit might follow in the same matter. The authorities generally hold that, in the absence of fraud or collusion, a judgment in a class action is binding on all for whom the suit was brought even though they have not participated in the proceedings. This identical question was raised in the case of *Hartford Accident & Ind. Co.* v. *Federal Bond & Mortgage Co.*, 59 Fed. 950, 956, cited on page 12 of our petition, which is perhaps the latest commitment on this question. There, this contention was held not good.

But even if it were not binding, defendants in the suit could protect themselves by moving that the receiver be made a party, or the court, on its own motion, might so order under the new Rules of Civil Procedure (Rule 21, F. R. C. P.). Under the numerous authorities, cited by these petitioners however, this is not jurisdictional but discretionary with the court and substitution may be made at any time, even after judgment.

But, although there is no authority to support the conclusion of the Circuit Court, let us concede, for the purpose of argument, that the receiver should be substituted. Even in such case, was the failure to substitute the receiver such a fatal infirmity as to justify the opinion af-

firming the dismissal of the complaint? Would it not have been more consistent with the new rules of civil procedure, and especially with Rule 21, liberalizing the method of adding parties, for the Circuit Court to have reversed the trial court and directed that a successor receiver be appointed and substituted as plaintiff? One of the prime purposes of these new rules is to prevent the miscarriage of justice and the loss of valuable rights of a litigant, because of some useless technicality, especially where the defect may be remedied without injury to the parties to the suit. Should not the Circuit Court have taken notice of the fact, that, at the time of the dismissal of the complaint, the receiver had long since deceased and that the court had refused to appoint a successor and that at that time there was no receiver to substitute? Furthermore, if the trial court had arrived at the same conclusion of law as later adopted by the Circuit Court and had held that the suit was regular and the receivership regular and that the only defect in the proceedings was the failure to substitute the receiver, these petitioners, in deference to such opinion, could have complied therewith by amendment or motion. Most certainly these petitioners would have had no objection to such a substitution had their attention been called to this theory. Petitioners now say, since their point has been raised, in accord with the same kind of suggestion made by counsel and acted upon by the court on appeal in the Hartford Accident & Ind. case, last cited, that they have no objection to the substitution of the receiver in the further prosecution of this suit if desired by respondents.

Attention is called to the fact that respondents do not now contend in their answer brief that this case has been abated because of the pendency of another suit involving the same subject-matter.

This is a suit by minority stockholders in behalf of all of the stockholders of the dissolved Oklahoma Corporation, charging their fiduciaries, officers and majority stockholders, with numerous frauds of the most flagrant nature by which they have enriched themselves in immense sums at the expense of the Oklahoma Corporation and its stockholders. They demand an accounting and that a lien or equitable trust be impressed upon most valuable property belonging to the defendants in which petitioners claim the fruits of these fraudulent acts have been invested. They then pray distribution of the amounts collected in final liquidation. This is the principal suit. As an aid thereto, they asked for a receivership which was granted. The respondents are seeking to avoid making answer to these serious charges brought by real parties in interest who are the ones injured by these breaches of trust.

The only other suit pending is Case No. 2050. That is an action brought by a creditor of the Nevada Corporation seeking to subject assets to the debts of the Nevada Corporation. It is not a suit to enforce restitution against the officers and majority stockholders. They are not defendants in that suit. The issues in the two suits are not common and respondents do not now make any such contention.

In fact, respondents in their response and answer brief,

definitely limit their contentions to *one* proposition of law as being the only one involved. On pages 2 and 3 of their response under the heading, "PROPOSITION OF LAW INVOLVED," they define this issue. This proposition is the one already discussed in this brief, namely that this suit has abated because petitioners have not caused the receiver herein to be substituted or secured permission of the court to prosecute this case in their own names. Respondents have elected to stand or fall upon the correctness or incorrectness of this one proposition.

The attempt of the respondents to limit this discussion to the single issue of law mentioned in their response, has a tendency to divert attention from their own activities in attempting to walk out of this suit with the *res* and place the control of the affairs of the Oklahoma Corporation back in themselves without the knowledge or consent of the court in this case. In view of this fact, petitioners again call attention to, and emphasize the baneful effects of, such activities if sanctioned by the courts, as set forth and discussed in their first and second assignments of error in their petition and supporting brief.

Petitioners respectfully submit that the decision of the Circuit Court of Appeals in this case is not only unsupported by the authorities but is contrary to the decisions of the courts in other circuits and of other courts in general. That it is so far a departure from the accepted and usual course of sound judicial proceedings as to deprive these petitioners of their substantial and valuable rights in securing remedies for wrongs committed against them. That if

the decision is allowed to stand as a rule of procedure governing such cases, it will prejudice the rights of all minority stockholders who desire, in the future, to secure redress for wrongs committed against them by their fiduciaries.

Respectfully submitted,

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